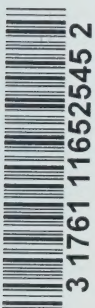


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Ontario

ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 338

DATE: Wednesday, January 8, 1992

BEFORE:

A. KOVEN Chairman

E. MARTEL Member



FOR HEARING UPDATES CALL (COLLECT CALLS ACCEPTED) (416)963-1249

FARR &
ASSOCIATES
REPORTING INC.

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-H 26



ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 338

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A. KOVEN Chairman

E. MARTEL Member

FOR HEARING UPDATES CALL (COLLECT CALLS ACCEPTED) (416) 963-1249

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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER OF a Notice by the
Honourable Jim Bradley, Minister of the
Environment, requiring the Environmental
Assessment Board to hold a hearing with
respect to a Class Environmental
Assessment (No. NR-AA-30) of an
undertaking by the Ministry of Natural
Resources for the activity of timber
management on Crown Lands in Ontario.

Hearing held at the Ontario Highway Transport
Board, 151 Bloor Street West, 10th Floor,
Toronto, Ontario, on Wednesday, January 8th,
1992, commencing at 4:05 p.m.

VOLUME 338

BEFORE:

MRS. ANNE KOVEN
MR. ELIE MARTEL

Chairman
Member

A P P E A R A N C E S

MR. V. FREIDIN, Q.C.)	
MS. C. BLASTORAH)	MINISTRY OF NATURAL
MS. K. MURPHY)	RESOURCES
MR. B. CAMPBELL)	
MS. J. SEABORN)	MINISTRY OF ENVIRONMENT
MS. N. GILLESPIE)	
MR. R. TUER, Q.C.)	
MS. E. CRONK)	ONTARIO FOREST
MR. R. COSMAN)	INDUSTRIES ASSOCIATION
MR. P. CASSIDY)	
MR. D. HUNT)	
MR. R. BERAM	ENVIRONMENTAL ASSESSMENT BOARD
MR. E. HANNA)	ONTARIO FEDERATION OF
DR. T. QUINNEY)	ANGLERS & HUNTERS
MR. J. MCGOWAN)	AND
MR. D. HUNTER)	NISHNAWBE-ASKI NATION
MR. M. BAEDER)	and WINDIGO TRIBAL COUNCIL
MS. M. SWENARCHUK)	FORESTS FOR TOMORROW
MR. R. LINDGREN)	
MR. D. COLBORNE)	GRAND COUNCIL TREATY
MR. G. KAKEWAY)	#3
MR. J. IRWIN	ONTARIO METIS & ABORIGINAL ASSOCIATION
MR. J. ANTLER	NORTHERN ONTARIO TOURIST OUTFITTERS ASSOCIATION
MS. M. HALL	KIMBERLY-CLARK OF CANADA LIMITED and SPRUCE FALLS POWER & PAPER COMPANY
MR. R. COTTON	BOISE CASCADE OF CANADA LTD.

APPEARANCES: (Cont'd)

MR. Y. GERVAIS)	ONTARIO TRAPPERS
MR. R. BARNES)	ASSOCIATION
MR. L. GREENSPOON)	NORTHWATCH
MS. B. LLOYD)	
MR. J.W. ERICKSON, Q.C.)		RED LAKE-EAR FALLS
MR. B. BABCOCK)	JOINT MUNICIPAL COMMITTEE
MR. D. SCOTT)	NORTHWESTERN ONTARIO
MR. J.S. TAYLOR)	ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL		GREAT LAKES FOREST
MR. S.M. MAKUCH		CANADIAN PACIFIC FOREST PRODUCTS LTD.
MR. D. CURTIS)	ONTARIO PROFESSIONAL
MR. J. EBBS)	FORESTERS ASSOCIATION
MR. D. KING		VENTURE TOURISM ASSOCIATION OF ONTARIO
MR. H. GRAHAM		CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN		DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC		MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES		ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI		BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY

I N D E X O F P R O C E E D I N G S

Page No.

GENERAL DISCUSSION:

Admissibility of witnesses with
respect to opinion polls.

59006

1 ---Upon commencing at 4:05 p.m.

2 MADAM CHAIR: Please be seated.

3 Good afternoon, ladies and gentlemen.

4 MR. CASSIDY: Good afternoon, Madam
5 Chair.

6 Perhaps I can leave this up to you. I
7 have had the opportunity to speak with my friend, Mr.
8 John McGowan, and I was advised by Mr. John McGowan
9 that in the past hour, I guess, that he was retained on
10 behalf of the Ontario Federation of Anglers and
11 Hunters. He is with the law firm of Cassels, Brock
12 and Blackwell to deal with this matter for which he
13 appeared today. Perhaps if you'd wish, Madam Chair, I
14 can speak to the matter.

15 I understand that our presence has been
16 requested here today to deal with the matter raised in
17 our statement of issues discussed in my absence at the
18 scoping session in respect of the potential objection
19 that I raised with the qualifications of one of the
20 witnesses scheduled to appear on the recent matters set
21 out on behalf of the Coalition.

22 It's the second witness statement which
23 is due to commence on Monday and in particular the
24 admissibility of an opinion poll, or rather two opinion
25 polls, which are the subject of that witness's

1 evidence.

2 That witness, Madam Chair, is
3 Mr. Hesselstine (phoen) from the Forests of Canada and I
4 think I should commence by saying I expect to be fairly
5 short here this afternoon because thanks to a
6 conversation I have had with Mr. McGowan in the past
7 hour, this matter may appear to be towards resolution,
8 and I would expect Mr. McGowan will obviously correct
9 me if I am wrong in relating this conversation to you,
10 but as I understand it the essence of the conversation
11 with Mr. McGowan the Anglers and the Hunters and the
12 NOTO Federation are, to use his words, 99 per cent sure
13 that Mr. Hesselstine will now not appear as witness to
14 deal with that opinion poll and it's sufficient to say
15 for today's purposes, I believe, that that was the
16 graven of our concern, that is Mr. Hesselstine's
17 participation at the hearing as the witness in order to
18 speak to those polls.

19 In as much as that has been communicated
20 to me my concern, our concern, in respect of Mr.
21 Hesselstine's qualifications and the resulting
22 inadmissibility of that poll is now moot, I have also
23 been advised by Mr. McGowan that the Anglers and
24 Hunters Coalition is looking to replace Mr. Hesselstine
25 with another witness.

1 I was, in fact, provided this morning
2 with a resume of a potential witness and, as a result,
3 it would probably now be premature to deal with the
4 motion in light of Mr. McGowan's conversation with me
5 that Mr. Hesseltine will not be appearing.

6 I should note one addendum to that and
7 that is that we are now, shall I say, investigating the
8 background of this potential new witness and we will
9 satisfy ourselves by Monday as to whether or not our
10 concerns of his qualifications are the same as
11 Mr. Hesseltine's.

12 It has also not been, I would say,
13 confirmed to me that this potential new witness is
14 going to be the one who testifies but we will consider
15 the matter at that time whoever testifies on behalf of
16 the Coalition during the second half.

17 We understand, Madam Chair, this is
18 normal course. The qualifications of a witness and the
19 admissibility of his evidence is usually challenged
20 once the person is before the Board on the stand and
21 there is an opportunity to ask certain questions on the
22 witness's background and that is the normal course.
23 That may have to occur in this situation in respect to
24 who their new witness is.

25 Having said that and to be honest with

1 you I think that is the substance of what we can say to
2 you today subject to the questions you may ask.

3 MADAM CHAIR: Yes, the Board does have
4 something to say to Mr. McGowan.

5 Now, Mr. McGowan, do you have anything to
6 add?

7 MR. MCGOWAN: Well, only briefly. I
8 should point out I was retained a little more than an
9 hour ago but I heard that there may be an issue to
10 speak to last evening and again this morning but my
11 understanding is that Mr. Hesseltine's evidence was
12 only to deal with the issue of the opinion poll.

13 I have read that portion of the
14 transcript where this issue came up in 1989 and my
15 further understanding is that the issues that were
16 raised at that time weren't necessarily relevant now
17 and that the proposal that the Coalition has to replace
18 Mr. Hesseltine with, the Coalition proposal will be the
19 person who obviously conducted the poll for environics.

20 It should resolve all of those issues and
21 what the Coalition was trying to do over the course of
22 today was just to make sure of that person's
23 availability. I can tell you that he has indicated
24 that he wants to be available but just hasn't been able
25 to clear it with his boss. The Coalition should know

1 tonight and I am sorry that we haven't been able to get
2 back to the Board earlier than now with a firm answer
3 that we could guarantee the appearance of the
4 individual who actually conducted the fly out.

5 Other than that I don't think I have
6 anything to add.

7 MADAM CHAIR: Thank you, Mr. McGowan.

8 Mr. Cassidy, we have reached a point of
9 this hearing at the end of four years that we don't
10 wait for a witness to get on the stand when you flag
11 ahead of time that you would be challenging his
12 qualifications.

13 With respect to possibly holding up the
14 hearing, we didn't want you to show up on Monday and
15 have this exact situation occur and then have to stand
16 down and wait around for an extra witness.

17 You know what a tight schedule we've got.
18 We simply can't afford that and we would put the
19 parties on notice in the future that you must have
20 known this would be the situation before the statement
21 of issues was submitted to the Board, and when you have
22 these kinds of concerns we want the Board to know ahead
23 of time so that we can discuss the matter, deal with it
24 beforehand and dispose of the matter before the
25 witnesses appear and we get on with the witnesses in

1 hearing the evidence.

2 As you know we have scheduled evidence to
3 be heard from nine to four, whatever our hearing hours
4 are, and we would deal with all procedural matters in
5 sessions afterwards.

6 That is the reason the Board asked you to
7 be here today and to hear what your problem was with
8 this particular witness and we are going to be in the
9 same situation because we don't want to show up on
10 Monday with any substitute witness the Coalition might
11 put on the stand and having to face the same problem.

12 So why don't you go over some of its
13 thinking on this matter? This is not in the form of a
14 ruling but certainly your client might benefit from the
15 Board's views on these matters.

16 First of all, we have also reviewed what
17 we said in June of 1989 and we are not in disagreement,
18 essentially, with what we have said at that point with
19 respect to the latitude of the Board to admit various
20 kinds of evidence that aren't always admitted in the
21 courtroom.

22 On the other hand we have been always
23 been free to put the weight we wanted on the evidence
24 we receive and, certainly, we can't project what our
25 views would be once we have heard the examination of

1 any witness on this particular piece of evidence, but
2 we certainly do view the opinion polls and surveys as a
3 different kind of evidence.

4 And Mr. Martel and I are not strangers to
5 the idea of survey techniques and what kind of evidence
6 that might produce and we certainly will consider very
7 carefully what we can discern from any kind of evidence
8 of that nature.

9 Something else that we have looked at
10 carefully is what the Coalition wishes the Board, what
11 message they are giving the Board with respect to this
12 specific evidence that Mr. Hesseltine was going to
13 testify to. And it's argued that the point of
14 producing this evidence is to arrive at some
15 conclusions that are certainly not revolutionary or
16 unheard of with respect to evidence that we have heard
17 from almost every other party to the hearing.

18 I am on page 17 of the witness statement.
19 Mr. Alexander, and not Mr. Hesseltine, refers to the
20 conclusions that Mr. Hesseltine has about the Forestry
21 of Canada survey and Mr. Alexander tells the Board very
22 clearly that the Coalition sees these results as really
23 undermining of three points the Coalition wishes to
24 make.

25 And these were in effect; public

1 consultation, increased public knowledge and awareness
2 and more effective participation by the average citizen
3 in timber management decision-making.

4 Those are certainly the views that have
5 been put before this Board over and over and over again
6 by expert witnesses and more particularly every lay
7 party who has come before the Board.

8 The Board finds it very difficult that
9 there would be some kind of challenge as to whether or
10 not these kinds of very general conclusions would
11 necessitate turning this into a major sort of
12 procedural problem.

13 Yes, Mr. Cassidy.

14 MR. CASSIDY: One would be tempted to
15 agree with you in fact, Madam Chair, subject to the
16 following comment that it has never been the intention
17 of my client to turn it into any issue, a principle of
18 law into a procedural problem.

19 This is a matter of a principle of law
20 and 46, subsection (3), specifically talks to the
21 admissibility of the petitions which, I think in the
22 previous ruling that the Board was talking about with
23 reference to the opinion polls and, assuming you were
24 right that the admissibility of the policies in issue,
25 the question of what the opinions of the poll are was

1 not why I made the objection to the statement of issues
2 and it is not why I would do it as a matter of course
3 in the matter of the statements being qualified.

4 It is a matter of a principle of law and
5 as you know the rules of law and evidence are different
6 for this proceeding but with respect to this particular
7 type of issue they are very much front and centre vis a
8 vis Section 46, subsection (3) and as a result, the
9 principle of that, the issue that is before this Board
10 I feel really bound to not only as a member of the bar
11 before this Board and on behalf of my client to raise
12 that concern, as we did in June of 1989.

13 So if I could separate between what the
14 conclusions of the poll are and what position we are in
15 here is that I do not anticipate it. I didn't think it
16 would be a major issue or a procedural issue. I would
17 submit that we are arguing about a principle of law
18 which is very much in the Board's consideration. Other
19 than that I have totally different comments on the
20 issue.

21 MADAM CHAIR: Well let's make it clear,
22 Mr. Cassidy, are you objecting to the admissibility of
23 any evidence about the Forestry of Canada surveys or
24 are you objecting to the specific witness who will be
25 testifying to this with evidence?

1 MR. CASSIDY: Well, if it was going to be
2 Mr. Hesselstine which I am now assured it undoubtedly
3 there is apparently, going to be a substitute...

4 MR. MARTEL: Let's for openers, let's
5 says it's him.

6 MR. CASSIDY: Okay. The law is, the
7 argument I would have made is whereas the admissibility
8 of this type of evidence is in issue and while
9 at any point are admissible, they are admissible
10 subject to spurious, what I consider to be and submit
11 are strict limitations on how they are admitted and one
12 of those is the person through whom the opinion poll is
13 being offered as evidence has to be qualified as an
14 expert in the integral design and the research and also
15 has to have been involved into the bill rights of that
16 and he also has to have been involved in the conduct of
17 the survey and it would have been my clear submission
18 that Mr. Hesselstine does not fit that billing. But you
19 know, either we felt that --

20 MR. MARTEL: Mr. Cassidy, just I worry.
21 Let's stop there. That's what I am saying.

22 If Mr. Hesselstine says in his statement
23 that he, in fact, was the person hiring someone to do
24 the pollings and it was Forestry Canada, in fact. As
25 most polls go they tell the type of question that they

1 want to ask.

2 In my understanding of polls anyway, the
3 pollster might put it in his own jargon but they have a
4 great, and by they I mean the person hiring someone to
5 do the polling, on what those questions would be as I
6 understand how polling works.

7 And if Mr. Hesseltine was the person who
8 directed traffic when he was hiring this company to do
9 the actual polling he would have had a great say, or
10 his staff, specifically what the type of questions that
11 would have been asked. I mean, that's where it hangs.
12 I mean is he an expert in his own right but if he was
13 the one who drafted the questions that makes him an
14 expert.

15 MR. CASSIDY: I submit it is inadequate
16 to do it personally with your clients, essentially, Mr.
17 Martel.

18 MR. MARTEL: In drafting the questions?

19 MR. CASSIDY: The person who is the
20 client and the reason why I was going to ask him in
21 cross-examination some questions on the extent of his
22 drafting those questions, that's why I was going to
23 leave this until Monday. I haven't had the opportunity
24 to ask the witness those questions which I was going to
25 ask him before challenging his qualifications.

1 But, if you look at the answers - this is
2 turning into a very unreal conversation because as I
3 understand it Mr. Hesseltine is not going to be here,
4 but the answer to the interrogatory responses he gave
5 he very clearly said he was not an expert in the
6 conduct and design of surveys and as a result I submit
7 it does not become another task for the public opinion
8 poller, therefore, to become admissible before this
9 Board or any other tribunal. But let's hang on for a
10 moment.

11 MR. MARTEL: He might not be an expert in
12 the actual method of polling but in ensuring that the
13 type of question he wants asked he would be directing
14 that.

15 MR. CASSIDY: He may very well be but I
16 submit that's inadequate for him to give evidence on
17 your point for disposing of the matter.

18 However, if you want to argue that I can
19 bring you some case law, Mr. Martel.

20 MADAM CHAIR: Well Mr. Cassidy, let's
21 push this along. What happens if the Coalition
22 produces the research from only facts that have been
23 found on this, on Monday, to give evidence about how
24 this poll was conducted, what would you do at that
25 point?

1 MR. CASSIDY: Well Madam Chair,

2 Mr. McGowan is going to provide me with the resume of a
3 person he is advising is the person on the staff and it
4 may very well be that my concern will be allayed. If
5 you have a person who, assuming he answers the question
6 yes, I conducted this poll and supervised it being
7 carried out and assuming he had an expert curriculum
8 vitae which I submit necessary, then my concern would
9 go away. Perhaps you were right.

10 But I have to satisfy myself of that moot
11 point at every point because otherwise there would be
12 no recourse. We just got the resume now. I have never
13 heard of this man before and we will definitely be
14 checking that out and I'd really want a base that I
15 could say that I anticipate I don't think that there is
16 going to be that problem if that if the person who is
17 going to be on the stand then, subject to one of my
18 advisers who is going to tell me off otherwise.

19 MADAM CHAIR: All right, Mr. Cassidy.

20 We don't want any more surprises before
21 Monday and so the Board will need to be notified.

22 Mr. Martel will be leaving at four
23 o'clock tomorrow and we would want to know, I guess by
24 noon tomorrow, if you will be, if you have any new
25 objections to this new witness that is being produced

1 by the Coalition.

2 MR. CASSIDY: Madam Chair, that address
3 places me in a bit of an uncomfortable position because
4 I have not had the benefit of asking this witness any
5 questions in advance or had his resume and I may have
6 to ask him some questions on the stand. I don't even
7 know who this witness is going to be or if, in fact, we
8 will know this afternoon.

9 If Mr. McGowan can confirm that he is
10 definitely going to be the person, but even if there's
11 somebody, but if someone else just shows up, to use the
12 vernacular mickey mouse could be put on the stand and I
13 would have no idea.

14 I am not going to be difficult and when I
15 prepared my statement of issues I didn't think I was
16 surprising anybody, but I may have to ask some
17 questions on the cross-examination right at the very
18 beginning when you qualify the witness as to whether or
19 not he is an expert. I have no idea of who that person
20 is going to be, I am just warning you, other than what
21 I have been provided with.

22 MADAM CHAIR: Then the final question the
23 Board has if you are satisfied with the qualifications
24 of this witness to discuss this type of work...

25 MR. CASSIDY: Yes.

1 MADAM CHAIR: ...then you don't have any
2 objections with respect to the evidence to which this
3 witness will be testifying.

4 MR. CASSIDY: Right. He would be
5 qualified as an expert witness, I assume, in the
6 opinion research methods and would then be entitled to
7 give evidence on the poll that was conducted and what
8 its outcome was and I would then be free to
9 cross-examine him on that and the issue for the Board's
10 assistance whichever issue is attached to it. That's
11 correct.

12 In fact, I should also state, Madam
13 Chair, that he has to have been in my respectful
14 submission, he has to have been the expert involved in
15 that poll. The person I have been advised is
16 Dr. Newman. I assume he will answer the question yes,
17 the witness, the resident involved in the poll witness,
18 was involved in the state from that objection of mine.
19 I would have to object if he had not even been involved
20 in policy.

21 MADAM CHAIR: All right.

22 Do any of the other parties wish to
23 comment on this matter? Mr. Freidin?

24 MR. FREIDIN: I would only maybe clarify
25 for the Board about the scoping session. I indicated I

1 wasn't going to raise this objection, that I was going
2 to question Mr. Hesseltine on his qualifications.

3 I was not intending to convey the message
4 to the Board at that time that I felt that the evidence
5 was a matter of law admissible or that Mr. Hesseltine
6 was, indeed, qualified in the matter applying to that
7 evidence. At that time the decision had been made by
8 my client that we were not going to attempt or raise
9 the legal issue or enforce the legal rights that we
10 believe were available to us.

11 I can advise you that since the matter
12 has been raised at least for the purposes of discussion
13 the matter of law has been raised specifically by my
14 friend, Mr. Cassidy. The motion proceeded. Had I been
15 asked whether as a matter of law I would agree with
16 him, I would have said yes. And I would support the
17 general propositions more or less made by Mr. Cassidy
18 in the general discussion.

19 MADAM CHAIR: The substitution of
20 another person, of Mr. Hesseltine by another witness,
21 does not change the cross-examination the parties have
22 prepared for this witness.

23 MR. FRIEDIN: Oh, I think it would
24 probably change perhaps the nature of it somewhat.

25 The peripheral matter perhaps we can

1 discuss in a moment after we have decided the
2 particular matter of what is going to be done here,
3 anything by the way of even an abbreviated witness
4 statement by the new witness and we have got a witness
5 statement which has been written by Mr. Hesselstine, I
6 am sure another witness would not accept that holus
7 bolus as a witness statement, him or her or what, if we
8 have a chance to turn our mind to that as well. I can
9 appreciate Mr. Cassidy's difficulty when you say let us
10 know by noon.

11 It's another thing to look at the
12 curriculum vitae we might very well decide to have a
13 talk prior to his submission. It's routine to address
14 the problem. Sometimes if you have a problem you have
15 to ask the questions.

16 We ask the questions by way of
17 qualifications. In fact, it was the response to those
18 very questions that then gave Mr. Cassidy some
19 information that he, Mr. Hesselstine, was not qualified
20 and I haven't seen the interrogatories. If they have
21 been are responded to in an abbreviated fashion by the
22 new witness that would be helpful as well.

23 If you don't like surprises neither do I.
24 The more information we have in advance the more
25 informed the submissions, quite apart from this.

1 MADAM CHAIR: Miss Seaborn, do you have
2 anything to say about this?

3 MS. SEABORN: No, thank you.

4 MADAM CHAIR: Mr. McGowan?

5 MR. MCGOWAN: Thank you, Madam Chair.

6 I've got three brief points on the legal
7 points that Mr. Cassidy has raised.

8 First, as I indicated earlier just sort
9 of to clear up misunderstanding, we won't know earlier
10 than this evening whether this specific witness is
11 available and, of course, I will be advising the
12 Coalition directly and will be advising the Board
13 members and Mr. Cassidy as soon as we have had
14 confirmation.

15 On the point of the admissibility of
16 opinion polls, three things I want to stated while
17 pointing out that I didn't come today prepared to offer
18 the Board extensive argument or case citations on this.
19 I only want to respond to a few things that Mr. Cassidy
20 has said and that I understand Mr. Freidin agreed to in
21 his summary.

22 No. 1, Rule 46(3), I did not interpret
23 that as in any way excluding any kind of evidence. It
24 merely states that where a Board receives a letter or
25 some other written communication it will offer the

1 parties an opportunity to comment on that letter. One
2 example of admissibility would be probative value that
3 would be relevant. Now that's one point. The rules
4 don't presently exclude opinion polls or any other kind
5 of evidence.

6 Second, Mr. Cassidy's position was that
7 opinion polls have to be put in evidence through an
8 expert in polling technique and I submit that's not
9 accurate. Let me give you one clear example.

10 A proponent in any undertaking is asked
11 how did you evaluate the different alternatives.

12 Answer: one of the ways that we evaluated
13 the different alternatives was to have a survey.

14 And the proponent puts in the survey and
15 the proponent is asked: "Are you are an expert in
16 surveying".

17 "Oh no, we had somebody else to do that
18 but that was something that we took into account
19 emphasizing what alternatives ought to be evaluated."

20 It may be that the Board would find it
21 useful for the people who conducted the survey to be
22 there so that the Board can know precisely how the
23 survey was conducted and it may be that the people who
24 conducted the survey were employees of the proponent or
25 were actual experts in conducting surveys and if the

1 persons conducting the surveys were experts, that might
2 well go some way towards determining how much weight
3 should be given to that survey and how useful it was.

4 But none of it goes to whether or not the
5 proponent took it into account in determining the
6 alternatives and none of it goes to whether or not it's
7 admissible evidence.

8 Now, as a related point where Mr. Cassidy
9 stated that if, for instance, the witness for whom he
10 has a curriculum vitae is the witness who appears on
11 Monday to speak on the issue of the poll, does that
12 resolve his problem. Mr. Cassidy's answer was "Well,
13 only if he's accepted as an expert in...."

14 And my submission to you, Madam Chair, is
15 well he either is or he isn't and if he is an expert in
16 polling techniques theoretically that's something that
17 you might well want to take into account in determining
18 the utility of this poll if it is to have relevance and
19 admissibility.

20 If it's just another lawyer, it doesn't
21 help much about polling at all the fact that he would
22 throw some facts down based on a conversation he had at
23 last night's cocktail party. It's still admissible
24 but, in my submission, perhaps of less use to the
25 Board. But it's still admissible.

1 Those are my comments on Mr. Cassidy's
2 submissions. I have no law to provide you with at this
3 time and I submit that if the Board is proposing to
4 make a ruling on this that it be set aside in summary
5 finding until Counsel has put more notice in on behalf
6 of his party, I am prepared to provide you.

7 MR. MARTEL: Set the hearing aside?

8 MR. MCGOWAN: Oh no, sorry, no.

9 MADAM CHAIR: The hearing starts Monday
10 morning.

11 MR. MARTEL: That's right.

12 MR. CASSIDY: I would support Mr. McGowan
13 on that. I mean this is not, I'd obviously take a
14 different view to a lot of Mr. McGowan. I could argue
15 with him again on the course that he's not going to
16 take.

17 If we get into the situation and as I
18 view it this is so unreal, in other words I may be
19 prejudging it but if we get into this situation it is
20 something that the Board has to consider and as a
21 result I support Mr. McGowan that we should have the
22 opportunity to debate this before you and it's not in
23 the room today, it's on the fence for today.

24 It is a matter of a principle of law
25 which may or may not go to the Board's jurisdiction.

1 It's essentially to give evidence on the issue and I
2 support Mr. McGowan in that respect and I submit, and
3 having looked at the law it might take an hour or less
4 but I don't think we should leave him, you know, to set
5 aside a time. Let's see what happens whenever they put
6 their witness on the stand.

7 So I support Mr. McGowan in that respect
8 as much as I have his evidence of the witness. That is
9 a statement of law.

10 MADAM CHAIR: What you are saying, Mr.
11 Cassidy, you are not asking for a real live report
12 today, you have asked for guidance.

13 You are here at 10:30 on Monday morning,
14 you will begin cross-examination of somebody, whichever
15 witness shows up to testify to his evidence, and the
16 Board has heard what you are saying and heard that
17 perhaps there won't be a problem and let's hope that we
18 can get on with this evidence and get it finished next
19 week and that's the way we will proceed.

20 If it turns out to be a problem then I
21 suggest that you be prepared to argue it on Monday.

22 MR. CASSIDY: Surely, Madam Chair.

23 THE CHAIR: Because we won't let it go on
24 after that.

25 MR. CASSIDY: I think Mr. McGowan it

1 really is a threshold issue to that portion of the
2 witness statement if it's going to be produced,
3 certainly.

4 MADAM CHAIR: Well, obviously you have
5 the feelings of the Board. You have our views.

6 MR. CASSIDY: Yes.

7 MADAM CHAIR: And we would like to have
8 this resolved and I think the Board can appreciate that
9 is necessary for all the parties and then we will
10 adjourn now and be back at ten thirty Monday morning.

11 Mr. Freidin?

12 MR. FREIDIN: I will speak to Mr. McGowan
13 about witness statements and interrogatories after we
14 have adjourned. It is still a concern of mine.

15 MADAM CHAIR: Well, what is your solution
16 Mr. Freidin?

17 MR. FREIDIN: My solution is to see
18 what's going to happen, in fact, deal with the problem.
19 If there's a problem I submit my position is perhaps
20 leave it till tomorrow and try to find out whether we
21 have a problem or not.

22 I am just telling you now that I think
23 that as a matter of fairness and to have it really run
24 as smoothly as possible I think it would be useful for
25 all parties and the Board to have some idea what a new

1 witness is going to say.

2 MR. MARTEL: Well, since we have spoken
3 now maybe your first can be panel three.

4 MR. FREIDIN: I am not sure our gentleman
5 can come from Vancouver. I am not changing your
6 policy. I am just saying it would be rather nice to
7 have somebody here.

8 MR. MCGOWAN: I'll advise the Court
9 there's a great possibility that the --

10 MR. MARTEL: Well, I understand the
11 difficulty but, I mean, the difficulty in getting
12 starting this off is becoming almost insurmountable.

13 MR. FREIDIN: Mr. Martel, I know --

14 MR. MARTEL: I think it's at four years
15 now.

16 MR. FREIDIN: Mr. Martel, I didn't say
17 that I would object to proceeding without a witness
18 statement. I said it would be nice to have one.

19 MR. MARTEL: I hear you Mr. Freidin but I
20 also would want to express my concern when I hear such
21 cold words.

22 MADAM CHAIR: Well Mr. McGowan, your
23 client might also think of another aspect of this and
24 perhaps Counsel can discuss it with you and that is if
25 there is certain evidence within this witness statement

1 which Mr. Hesseltine may still need to be available to
2 address and that may be what Forestry Canada has done
3 with this data as opposed to how the survey was
4 conducted. There may be certain aspects of the witness
5 statement in which Mr. Hesseltine's appearance as a
6 witness is still a very viable end route, in his
7 capacity that's the person who conducted the survey but
8 in how the survey results were used because there is
9 relevance in that.

10 MR. MARTEL: There is one other
11 consideration they might look at as well but if there
12 is a procedural discussion Monday and it's a shorter
13 day Monday there's a possibility of bringing forth the
14 other two people involved in this witness statement and
15 hearing them first while someone prepares a draft of
16 some of the concerns expressed by Mr. Freidin so that,
17 in fact, we can get the first two people done and then
18 move to the survey towards the end. That would be of
19 some help.

20 MADAM CHAIR: Thank you. I think would
21 Mr. Hennebry (phoen) be there to - how much for your
22 examination, one day?

23 MS. SEABORN: Monday.

24 MR. FREIDIN: Well yes, we estimate one
25 day.

1 MADAM CHAIR: One day?

2 MR. FREIDIN: One day.

3 MR. CASSIDY: It was one day.

4 MADAM CHAIR: Thank you. I think Mr.

5 Martel isn't finished yet.

6 Mr. McGowan, what is your retainer

7 because are we going to be seeing you?

8 MR. MCGOWAN: Well certainly if this

9 becomes an issue on Monday I think you will see me on

10 Monday.

11 MADAM CHAIR: But you are not involved in

12 any other respect with another issue.

13 MR. MCGOWAN: Madam Chair, to tell you

14 the truth the last person you saw from our office was

15 Dennis O'Leary.

16 MADAM CHAIR: Right.

17 MR. MCGOWAN: And I don't know what

18 conversation The Coalition has had with Mr. O'Leary.

19 He really is the lawyer having conduct of this case to

20 the extent that our firm has been called in so I

21 hesitate to say firmly that we are not appearing to put

22 in the evidence of the Panel 3, but I don't think we

23 are.

24 MADAM CHAIR: All right, thank you very

25 much. We'll see you on Monday.

1 ---Whereupon the hearing was adjourned at 4:40 p.m., to
2 reconvene on Monday, January 13, 1992 at 10:30 a.m.



